

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHIN KIM

Claimant

VS.

SCHWAN'S FOOD MANUFACTURING

Respondent

AND

HARTFORD INS. CO. OF THE MIDWEST

Insurance Carrier

Docket No. 1,041,254

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 22, 2011, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Mickey W. Mosier, of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) considered and denied claimant's preliminary hearing requests, finding that claimant failed to establish that he is in need of additional treatment as a result of the March 30, 2008, accident.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 3, 2011, Preliminary Hearing and the exhibits; the transcript of the March 8, 2011, preliminary hearing and the exhibits; and the May 20, 2011, Deposition of Dr. John Babb and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends the ALJ erred in denying his claim for medical treatment because his testimony, along with the medical opinions of Drs. Keating, Poppa and Babb, show that claimant's current need for medical treatment for permanent injuries to his left thigh, left hip, and low back arose out of and in the course of his employment as a result of a work-related accident on March 30, 2008. Therefore, claimant asks that the Board reverse the

ALJ's preliminary hearing Order and enter an order granting his request for medical treatment for his low back injury. Further, claimant asks the Board to remand the case to the ALJ for determination and order on the appointment of an authorized physician to treat claimant's low back injury.

Respondent argues that the ALJ's Order should be affirmed because the claimant failed to prove that he suffered a work-related injury to his low back.

The issue for the Board's review is: Is claimant's current need for medical treatment for his low back the result of the March 30, 2008, accident while employed by respondent?

FINDINGS OF FACT

Claimant began to work for respondent on March 4, 2008. Claimant testified that in the course of his employment, on March 30, 2008, he suffered injury to his left thigh, hip and back when he slipped and fell four feet off a conveyor. He testified that in the process of trying not to fall to the ground, he twisted his body and hit his thigh and hip on the line frame. Claimant reported the accident and an incident report was filled out by his supervisor. He was then sent to the nurses' station to be examined. Pam Willis, a nurse for respondent, found that claimant had a contusion to the left upper leg, had slight redness to the lateral thigh, and was limping. He was treated with ice to the left leg for 20 minutes, was released, and returned to work. Claimant refused Ibuprofen and Tylenol.

Ms. Willis testified that she saw claimant at the first aid station on March 30, 2008, for a contusion to claimant's left upper leg. Claimant made no mention of any injury to his low back. Ms. Willis testified that when an employee comes in and reports a work-related injury, they are to check in with the first aid station daily to check their progress. Claimant's entries cover from the date of accident, March 30, 2008, to his last day, May 10, 2008. Ms. Willis testified that the first aid station is staffed with medical personnel 24/7.

Ms. Willis testified that the records show claimant was contacted and messages were left for the claimant to call in about arranging an appointment with Dr. James Shafer, the company physician. Claimant never returned the calls. Claimant testified that he never met with Dr. Shafer because the appointments were always made when he was not able to get there. Claimant testified that because he drove in from Junction City, he preferred to have early morning or late afternoon appointments, either right before his shift or right after. Claimant testified that all of the appointments that were made were for the early afternoon, after claimant had already gotten off work and had gone home.¹ He tried several times to get the nurse to make him an appointment during a time he would be able to get there, but it never happened.

¹ P.H. Trans. (May 3, 2011) at 23-24.

Claimant continued to work with pain, and on April 28, 2008, gave his two weeks notice that he was ending his employment effective May 10, 2008. Claimant testified that once he put in his two weeks notice, he was sent to Les Durst for physical therapy. He had five days of physical therapy. He stated he complained to Mr. Durst about his back pain and was told to see a doctor to find out what was wrong before having any therapy for the back. About a week later, after claimant's last day of work for respondent, he went to work for Florence Manufacturing sanding mailboxes. After four months and an injury to his right hand, claimant left that job and in June or July 2008, went to work for Gray and Company doing some painting.

Claimant continued to have pain and began receiving chiropractic treatment from Dr. Eric Keating on July 1, 2008. Dr. Keating noted that claimant's left thigh pain got worse with his painting job with Gray and Company.

Claimant was referred by his attorney to orthopedic surgeon Dr. Joseph Huston on September 9, 2008. Dr. Huston opined the following regarding claimant's condition specifically the low back:

This man had an injury at work on 3-30-08 The knee and hip motions are normal. Examination of the low back today is completely normal. The injury to his low back was a lumbar strain, which is now almost completely resolved. There is no evidence of any nerve root or disc problem. I do not see need for any X-rays of the femur or back and also no need for MRI examination. I believe no continuing active treatment is required.²

Claimant last worked for Gray and Company in February 2009. In May 2009, claimant started his own business managing an apartment complex. Claimant doesn't perform any physical duties as he has someone to handle the maintenance duties.

Claimant testified that he continues to have pain in his left thigh, left hip and back. Two weeks before the May 3, 2011, hearing, claimant was riding a bike and began to have sharp pain in his back and hip, which he related to the March 2008 accident, and he fell down, injuring his knee and left eye.

Claimant met with Dr. Michael J. Poppa on April 6, 2010, at claimant's attorney's request. Dr. Poppa asked claimant if he had any remaining pain complaints secondary to his March 30, 2008, work injury, and claimant responded he had sharp pain and numbness inside his left thigh and pain in his back. Dr. Poppa opined that claimant's work-related injury and employment with respondent was the direct and proximate cause of claimant's work-related injury with residuals involving the left lateral thigh and lumbar spine. He further stated he believed this injury occurred during the course and scope of claimant's employment and caused or substantially contributed to claimant's present condition and

² P.H. Trans. (Mar. 8, 2011), Resp. Ex. I at 3 (Dr. Huston's Sept. 9, 2008 report).

need for treatment. He went on to recommend that claimant have an MRI scan of the left thigh but felt claimant could continue to work without restrictions.³

Claimant testified that when he met with orthopedic surgeon Dr. John Babb in Wichita on December 8, 2010, for the court-ordered IME, he reported pain in his hip, back and thigh area and related it to his March 30, 2008, accident. Dr. Babb agreed. Dr. Babb diagnosed claimant with low back pain with possible radicular symptoms to the left lower extremity and resolved left thigh contusion. For treatment, he recommended an MRI of the pelvis and lumbar pins and an NCT and EMG of the left lower extremity. Further treatment would depend on the result of testing but might include physical therapy, epidural injections and anti-inflammatory medications.⁴

Dr. Babb testified that when he met with the claimant in December 2010, the claimant reported that he fell and twisted his back on March 30, 2008, and that claimant's back pain was present shortly after the fall. Dr. Babb testified that he would expect for someone who had a fall and twisted his back to encounter symptoms or pain from the accident. He stated with an injury such as claimant reported, he would have expected pain at the time of the accident and it would not be typical for the pain to develop three months after the accident.⁵

Dr. Babb stated that the physical records he reviewed from April 28, 2008, to May 2, 2008, made no mention of claimant complaining of back pain. There was only a diagnosis of left thigh contusion mentioned in the physical therapy evaluation. Dr. Babb noted that claimant's medical records show he visited the nurses' station at respondent about 30 different times for treatment and observation after his accident, and there was no mention in those records that claimant complained of back pain.

Dr. Babb went on to explain that he didn't know for sure if claimant's back injury was caused by the work accident in March 2008.

Q. [by respondent's attorney] Can you tell me if there's any records that you recall reviewing or that you have made notes of reviewing from the first few weeks after Mr. Kim's work accident that indicate that he had a back injury or back pain?

A. [by Dr. Babb] The one that I have from September of '08 shows examination of low back today was normal. But there was some pain in July from Dr. Keating.

Q. Okay, so -- so the one in July from Dr. Keating would be about four months after the work accident?

³ P.H. Trans. (Mar. 8, 2011), Resp. Ex. J at 3-4 (Dr. Poppa's Apr. 6, 2010 IME report).

⁴ P.H. Trans. (Mar. 8, 2011), Resp. Ex. K at 4-5 (Dr. Babb's Dec. 8, 2010 IME report).

⁵ Babb Depo. at 5.

A. Do you have a physician's report right after the injury?

Q. All we have right after the injury are the nurse's notes and the physical therapy notes. That's all I have seen. Have you seen anything other than that?

A. I don't have anything else that you don't have.

...

Q. Whether you can give an opinion within a reasonable degree of medical certainty that Mr. Kim's back injury that he's complaining of today was caused by that accident three years ago.

A. No, all I know is that Mr. Kim told me that he twisted his back and fell on a piece of metal in March of 2008. That's all I know. And from the records I know I don't see any records about the physician stating that he hurt his back but all I see is the therapy notes that you brought today. But I can't say for certain.⁶

Dr. Babb later testified that from the information he had and from claimant's history, the back and hip pain go together and are more likely than not associated with claimant's March 30, 2008 injury.⁷

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁸ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁹

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the

⁶ Babb Depo. at 13-14.

⁷ Babb Depo. at 16.

⁸ K.S.A. 2010 Supp. 44-501(a).

⁹ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹⁰

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹²

ANALYSIS

Claimant suffered personal injury as a result of a fall at work on March 30, 2008. Respondent does not dispute the compensability of that accident and the injury claimant sustained to his left leg. Respondent does dispute, however, that claimant injured his back in that accident and that his current complaints are the result of that work-related accident. In support of its position, respondent points to the absence of back complaints in the contemporaneous and subsequent medical treatment records, in particular the numerous nurses' notes from respondent's first aid station, the physical therapy records, and the records from claimant's September 9, 2008, examination with Dr. Huston, which found no problems with claimant's back. The records of claimant's chiropractor, Dr. Keating, do mention back complaints, but those symptoms are attributed to claimant's subsequent employment activities as a painter at Gray and Company. In his June 22, 2011, Order, the ALJ said:

It is difficult to connect Claimant's current complaints of low back pain to the March 30, 2008 accident. The absence of contemporary complaints of low back pain in treatment records until July, after Claimant had worked for two other employers, and his normal examination and release from further evaluation or treatment in September, persuade this court that any current low back pain is unrelated to the accident of March 30, 2008.¹³

¹⁰ *Id.* at 278.

¹¹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. ___, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

¹² K.S.A. 2010 Supp. 44-555c(k).

¹³ ALJ Order (June 22, 2011) at 3.

This Board Member, as a trier of fact, must decide which testimony is more accurate and/or more credible.¹⁴ Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's witness testify in person. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently did not believe claimant's testimony. After reviewing the record compiled to date, this Board Member concludes that even though claimant testified through an interpreter, some deference should be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing claimant and Ms. Willis testify.

This record presents a close question, but due to the delay in reporting back symptoms, claimant's subsequent physical work and personal activities, including running, and the inconsistencies in the record concerning when those symptoms started, this Board Member concludes that the ALJ's Order should be affirmed.

CONCLUSION

Claimant has failed to prove that his current need for medical treatment for his low back is a direct result of his March 30, 2008, accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated June 22, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Jared T. Hiatt, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

¹⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).